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NO. 86-74

In the Supreme Court of the United States

OCTOBER TERM, 1986

GULF OIL CORPORATION

Petitioner

VERSUS

DANOS & CUROLE MARINE CONTRACTORS, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT OF PARTIES

Texaco Inc., Amicus Curiae herein, has obtained the written consent of Gulf Oil Corporation (Petitioner) and Danos & Curole Marine Contractors, Inc. (Respondent) to the filing of this Brief of Amicus Curiae in Support of Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE

Texaco Inc. is an interstate corporation engaged *inter alia* in the development and production of minerals from federal leases located on the Outer Continental Shelf. Texaco Inc. has extensive operations in federal waters in the Gulf of Mexico, including Offshore Louisiana, which may be dramatically affected by the lower court's ruling extending the Louisiana Oilfield Indemnity Act to fixed platforms on the Outer Continental Shelf.

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SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fifth Circuit erred in extending the Louisiana Oilfield Indemnity Act ("LOIA") to fixed platforms located on the Outer Continental Shelf ("OCS"). The Outer Continental Shelf Lands Act ("OCSLA") authorizes application of federal law in resolving questions and issues arising in the OCS. At the same time, however, the OCSLA adopts the law of the adjacent state as surrogate federal law to the extent that it is not inconsistent with applicable federal laws and regulations. 43 U.S.C. § 1333(a)(2)(A) (1983). The intent behind OCSLA was to treat artificial structures covered by the act as federal enclaves for purposes of defining applicable law. *See, Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, (1969).

The LOIA attempts to nullify and void as "against public policy of the State of Louisiana" any and all contract provisions which seek to indemnify and hold harmless a party against liability for personal injury. La. Rev. Stat. Ann. § 9:2780 (West Supp. 1985).

The LOIA cannot apply to fixed platforms located on the OCS since: 1) it is preempted by a comprehensive body of federal law governing the exploration, development and production of hydrocarbons from the OCS; 2) it is inconsistent with a federal body of common law recognizing the validity of indemnity contracts; 3) it is an impermissible extension of a state's exercise of its police power imparing the obligation of contracts into an area of exclusive federal jurisdiction; and 4) it imposes an undue burden on interstate commerce.

ARGUMENT

I.

LOIA DOES NOT APPLY TO THE OCS SINCE IT IS PREEMPTED BY AN EXHAUSTIVE BODY OF FEDERAL LAW GOVERNING THE EXPLORATION, DEVELOPMENT AND PRODUCTION OF MINERALS FROM THE OCS.

In 1953 Congress enacted the OCSLA, 43 U.S.C. § 1331-56 (1983), extending the power to the federal government to grant oil and gas leases to various areas on the OCS and to control the exploration, development and production of subsurface mineral resources. The federal government was thus granted exclusive jurisdiction over the OCS to the exclusion of adjacent states. *See, United States v. Texas,* 339 U.S. 707, reh'g denied, 340 U.S. 907 (1950); *United States v. Louisiana,* 339 U.S. 699, reh'g denied, 340 U.S. 856 (1950); *United States v. California,* 332 U.S. 19, reh'g denied, 332 U.S. 787 (1947); *Maryland v. Louisiana,* 451 U.S. 725 (1981). A comprehensive body of federal law and regulations rapidly developed which

governed all activities concerned with the production and development of hydrocarbons from the OCS. As a result, numerous federal agencies control virtually every aspect of this industry. The Department of the Interior awards leases. 43 U.S.C. § 1347 (1983). The Coast Guard provides safety and health regulations. 43 U.S.C. § 1348 (1983). The Mineral Management Service administers royalties and technical or engineering activities on the OCS. 43 U.S.C. § 1334 (1983). And the Federal Energy Regulatory Commission controls transportation and in some cases prices of natural gas produced from the OCS under the auspices of the Natural Gas Policy Act of 1978. 15 U.S.C. § 3301-432 (1983).

In a complex, capital intensive undertaking such as the production of subsea minerals there is necessarily a great deal of work which must be performed on a contract basis by a variety of companies with expertise in different fields. An important element of this contracting is the allocation of risks agreed to by the parties, often through indemnity agreements. The LOIA nullifies as against the public policy of the State of Louisiana any and all such provisions which indemnify a party against liability for personal injury. La. Rev. Stat. Ann. § 9:2780 (West Supp. 1985). Adoption of the LOIA as surrogate federal law under 43 U.S.C. § 1333(a)(2)(A) (1983) would directly affect the relationship of the contracting parties by altering agreed upon financial burdens and would directly impact operations for the development and production of minerals from the OCS by making certain economic evaluations concerning the development of federal leases dependent upon the law of the adjacent states. Since a state does not have jurisdiction to enact any laws directly controlling or administering operations on the OCS, to allow such a result

through an indirect action by the extension of the LOIA to fixed platforms on the OCS would circumvent the structure and purpose of the OCSLA. One concern would be an erosion of the uniformity created by the OCSLA to govern the orderly development of the OCS. It is well settled that, even in areas of state jurisdiction, federal law may be preemptive where the need for uniformity exists. In this instance, the converse is apparent. Louisiana state law has the direct effect of undermining uniformity in an area of exclusive federal jurisdiction. The fact that different adjacent states may attempt to enact inconsistent laws concerning indemnity and other aspects of a party's contractual relationship could operate to impede development of certain areas of the OCS, disrupt the goal of orderly development inherent in the OCSLA and impose a burden on interstate commerce.

II.

THE LOIA IS IN DIRECT CONFLICT WITH FEDERAL COMMON LAW WHICH UPHOLDS THE VALIDITY OF INDEMNITY CONTRACTS.

In addition to being inconsistent with a comprehensive body of federal law regulating operations on the OCS, the LOIA is directly in conflict with a body of federal common law permitting indemnity contracts.

In *United States v. Seckinger*, 397 U.S. 203 (1970), this Court used "federal law" to interpret a contract and permitted an indemnitee to be indemnified pursuant to express contractual provisions. It is readily apparent that the LOIA is in direct conflict with this "federal common law" case and therefore cannot apply to supplement federal law

on fixed platforms located on the OCS. The Fifth Circuit itself has interpreted and upheld indemnity contracts based on federal law. *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge*, 424 F.2d 684 (5th Cir.), cert. denied, 400 U.S. 832 (1970).

The ruling of the United States Court of Appeals for the Fifth Circuit also creates a schism with the decisions in other circuits. *See, Beloit Power Systems Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd Cir.1985); *Eastern Airlines, Inc. v. Insurance Co. of North America*, 758 F.2d 132 (3rd Cir. 1985) in which the United States Court of Appeals for the Third Circuit interpreted contracts according to federal common law and upheld indemnity provisions.

III.

APPLICATION OF LOIA TO THE OCS WOULD BE AN IMPROPER EXTENSION OF STATE POLICE POWER TO IMPAIR CONTRACTS INTO AN AREA OF EXCLUSIVE FEDERAL JURISDICTION.

The extension of the LOIA to fixed platforms on the OCS is a dangerous precedent which warrants review by this Court. The United States Court of Appeals for the Fifth Circuit in *Doucet v. Gulf Oil Corp.*, 783 F.2d 518 (5th Cir.),reh'g denied, 788 F.2d 250 (5th Cir. 1986), assumed in reaching its decision that federal law is silent as to the validity of indemnity agreements, and that this silence created a gap to be filled by state law. The silence is deafening. Simply because Congress has not acted to expressly approve indemnity agreements *per se* does not mean that

it intended that state law should be used to supplant established federal policy and practice in this area.

The freedom of an individual to contract is considered such a basic right of a citizen of the United States that it is protected by the United States Constitution: "No State shall ... pass any ... law imparing the obligation of contracts ...." U.S. CONST. art. I, § 10, cl. 1. Hence no state can pass a law imparing a contract unless it is a valid exercise of that state's police power to insure the health, safety or welfare of its citizens. However, the OCS and any fixed platforms located thereon are considered federal enclaves and within an area of exclusive federal jurisdiction. *See, Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). Accordingly, impairment of an individual's right to contract with respect to activities taking place on the OCS would require an exercise of congressional authority rather than state police power. Congress has never seen fit to exercise that power to invalidate indemnity agreements. Congress' silence does not create a lacuna in the law but rather leaves intact an individual's constitutional right to contract, including the option to pre-apportion risk through indemnity agreements. The application of the LOIA to the OCS would thus be an illogical and unfounded extension of state police power into an area of exclusive federal jurisdiction in which Congress has not seen a need to exercise its authority.

In *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400 (1983), this Court upheld a state's use of its police power in regulating the price of *intrastate* natural gas even though it may have impaired the obligations of contracts. However, the Court also noted that it had struck down the state's earlier attempt to set a wellhead price because

the price regulation extended to gas in *interstate* commerce — an area of exclusive federal jurisdiction. *Id.* at 413 (n. 17). This amply demonstrates that a state's exercise of its police power, even though valid within its jurisdiction, will not be extended to an area of exclusive federal regulation such as interstate gas, and in this case should likewise not be extended to the OCS.

IV.

APPLICATION OF LOIA TO THE OCS IMPOSES AN UNDUE BURDEN ON INTERSTATE COMMERCE AND VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

The Commerce Clause of the Constitution of the United States provides: "Congress shall have power to ... regulate Commerce ... among the several states." U.S. CONST. art. I, § 8, cl. 3. Application of LOIA to fixed platforms on the OCS will impose an impermissible burden upon interstate commerce in violation of the Commerce Clause by rearranging pre-apportioned financial obligations of Companies engaged in interstate commerce. In *Morgan v. Virginia*, 328 U.S. 373 (1946), this Court invalidated a statute requiring the segregation of bus passengers as being an undue burden on interstate commerce. In reaching this decision the Court held that, "[i]t is equally well settled that, even where Congress has not acted, state legislation ... is invalid which materially affects interstate commerce." *Id.* at 379. In this case the Court found that, "[a] burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than National requirements." *Id.* at 380-81. The Court also

held that the imposition of such a burden cannot be justified as an exercise of the state's police power.

If the inconvenience of having to rearrange seating during an interstate trip was accorded enough significance in interstate commerce so as to warrant protection from any undue burdens imposed by a state, even where there is *no* federal regulation, then the parties, activities and contracts involved in producing hydrocarbons from the OCS should be granted the same relief. As opposed to being an area where there is no federal regulation, this is a highly federally regulated area due in large part to its national importance and interstate nature. In fact, Congress has defined natural gas which is produced from the OCS as being committed or dedicated to interstate commerce under the terms of the NGPA. 15 U.S.C. § 3301 (18)(A)(i) (1983). As noted in *Energy Reserves v. Kansas Power and Light*, 459 U.S. 400 (1983), such attempts to regulate interstate gas have already been rejected. To subject such an important national interest to the vagaries of various state statutes would impose great burdens on interstate commerce, *directly* impact financial obligations of interstate businesses and disrupt the uniform development of a vital national resource. This is particularly true where the state itself is not attempting to apply its police power to the OCS but rather that power is being judicially extended as surrogate federal law to fill a supposed gap.

CONCLUSION

The application of the LOIA to fixed platforms on the OCS is preempted by an exhaustive body of federal regulation covering exploration for and development of subsea mineral resources. LOIA is also contradictory to a

body of federal common law permitting parties to enter into contracts which pre-apportion financial responsibilities and risks through indemnity provisions. LOIA does not fall within the rubric of 43 U.S.C. § 1333(a)(2)(A) (1983) since it is neither applicable nor consistent with the relevant federal law. If anything, application of LOIA to the OCS would be tantamount to an impermissible restriction imposed by a state on the orderly uniform development of important national resources within an area of exclusive federal jurisdiction.

LOIA cannot be applied to the OCS since it would be an unconstitutional extension of a state's use of its police power to impair contracts into an area of exclusive federal jurisdiction and would violate the Contract Clause and Commerce Clause of the Constitution of the United States. Gulf Oil Corporation's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed by U. S. Mail to all counsel of record, and to the Attorney General for the State of Louisiana this 19th day of September, 1986, New Orleans, Louisiana.

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